SUPREME COURT, U. S.

84

No. [redacted]

Office-Supreme Court, U.S.
FILED
APR 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri

JURISDICTIONAL STATEMENT

HERBERT A. BERGSON
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
SAMUEL H. SEYMOUR
BERGSON & BORKLAND
888 Seventeenth St., N.W.
Washington, D. C. 20006

WILLIAM K. UNVERZAGT
1501 Alcoa Building
Pittsburgh 19, Pennsylvania

Attorneys for Appellees

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., 1a-24a), which contains the court's findings of fact and conclusions of law, is reported at 233 F. Supp. 718. The court's Final Judgment (App., 24a-26a) is unreported.

JURISDICTION

This is a civil action by the United States under Sections 7 and 15 of the Clayton Act (15 U.S.C. §§ 18, 25). The judgment of the district court was entered December 4, 1964, and notice of appeal was filed January 22, 1965. The jurisdiction of this Court is conferred by the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *Maryland & Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458 (1960). By orders entered March 12 and 25 and April 16, 1965, the district court extended the time for docketing this appeal to April 26, 1965.

QUESTIONS PRESENTED

This appeal is limited to the district court's order requiring Aluminum Company of America (Alcoa) to divest its aluminum fabricating facility at Corona, California, which, though leased to and operated by Cupples Products Corporation (Cupples), was built by Alcoa more than two years after it acquired Cupples. The court's decision on the merits and its order to divest Cupples are not challenged. The following questions are presented:

1. Whether the district court erred in ordering divestiture of an after-created plant which was not a replacement for or improvement to unlawfully acquired assets, was not financed by the sale of unlawfully acquired property or by profits of the acquired company, was not an integral part of the acquired company necessary in order to reconstitute it as a viable competitor, and which could be economically utilized by the acquiring company even if the public interest required

that its use be restricted to lines of commerce not involved in the case.

2. Whether the district court erred in ordering such divestiture without findings of fact, conclusions of law or opinion explaining why the public interest could not be adequately protected by means less drastic than divestiture of after-created property.

STATUTE AND RULE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Rule 52(a), Federal Rules of Civil Procedure, as amended January 21, 1963, provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due re-

gard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

The Government filed its complaint on April 27, 1961, charging that Alcoa's acquisition of all the outstanding stock of Cupples violated Section 7 of the Clayton Act (15 U.S.C. § 18). The district court, after trial, concluded that the acquisition violated the statute (App., 22a-23a), and has ordered Alcoa to divest itself of (1) all ownership of Cupples, and (2) all right, title and interest in manufacturing facilities at Corona, California (App., 24a-25a), which were built and paid for by Alcoa two years after it had acquired Cupples (App., 3a). As stated in the Questions Presented, this appeal is limited to the order requiring Alcoa to divest the after-created Corona plant.

1. Description of Appellants

Cupples was, and is, a corporation organized under the laws of the State of Missouri, with its principal offices in St. Louis, Missouri (App., 2a). It commenced operation in 1946 as a fabricator of double hung windows made partly of wood and partly of aluminum, and gradually expanded into other aluminum products (App., 5a-6a). In the years immediately preceding the acquisition, aluminum nonresidential windows and

curtain wall were by far the most significant of Cupples' products, accounting for approximately 70 percent of its total sales (App., 6a).[1] At the time of acquisition, Cupples operated plants at St. Louis, Missouri, and Dowagiac, Michigan, and a warehouse at Dallas, Texas; in addition, since August 1962, approximately two and one-half years after the acquisition, it has operated a facility at Corona, California, under lease from Alcoa (App., 5a-6a; DXR 1; R. XIV. 2922).[2]

In 1959, the year preceding the acquisition, Cupples had assets valued at $5,313,072, and total sales of $13,575,481 (App. 6a-7a). On the basis of an Alcoa survey the court found that in 1957 Cupples was the largest fabricator of aluminum curtain wall, Cupples' principal product and one of the two lines of commerce established by plaintiff (App., 15a-16a).[3] The court made no findings as to Cupples' market position in the field of metal curtain wall, the second line of commerce

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[1] The balance of Cupples' sales was divided among aluminum extrusions, suspended ceiling systems, highway railings, non-residential doors, door frames, store fronts and entrances (App., 6a).

[2] All citations are to the original record on appeal. "DXR" refers to defendants' exhibits admitted at the hearing on relief held November 24, 1964; "GX" and "DX" refer to Government exhibits and defendants' exhibits admitted at the trial. The transcript of the trial appears in Volumes XVI through XXXVI, which are paginated consecutively. The balance of the record, except for exhibits which have not been placed in volumes, is contained in Volumes I-XV. The hearings on relief held October 23 and November 24, 1964 appear in Volumes XIII and XIV.

[3] Curtain wall is an exterior nonload-bearing wall which keeps out the elements and lets in light, and is attached to the structural framework of a building. Curtain wall may be made of a great variety of materials, both metallic and nonmetallic, and may be designed in a wide variety of different styles and forms (App., 10a, 13a-14a).

established by the Government, or as to Cupples' standing with respect to any of its other products.

Alcoa is an integrated producer of aluminum and aluminum products, with total assets in 1960 in excess of $1 billion and 1960 sales in excess of $800 million (App., 5a). Although it is still the largest domestic producer of primary aluminum, with a 32 per cent market share in 1959, Alcoa's market position has dropped sharply owing to the entry of substantial domestic and foreign competition since World War II (App., 4a-5a). Alcoa was not, and was not claimed to be, substantially competitive with Cupples. Similarly, while Alcoa is an important supplier of aluminum to the building industry, the acquisition of Cupples, which consumed less than ¼ of 1 per cent of primary aluminum available for domestic use (DX 198, 201; R. XXXIV 2278, 2281-2282), did not result in substantial foreclosure of Alcoa's aluminum-producer competitors, and the Government so conceded prior to trial (App., 7a).

On November 20, 1959, Alcoa and Cupples entered into a plan and agreement of reorganization under which Alcoa agreed to acquire all of the authorized and outstanding stock of Cupples in return for Alcoa stock having a market value of $6,750,000 (GX 16; R. XVI 116). The transaction was consummated on January 22, 1960, and Cupples has since been operated as a wholly-owned subsidiary of Alcoa.

2. The Corona, California, Facility

The Corona facility is a light aluminum fabricating plant located at Corona, California, near Los Angeles. The site was selected and purchased by Alcoa in 1961 (R. XIV 2920-2925, 3017-3018), and the plant was

constructed and equipped in 1962, more than two years after the Cupples acquisition (R. XIV 2980). Though leased to and operated by Cupples, the Corona facility is owned by Delcalo, Inc. (formerly Gateway Properties, Inc.), an Alcoa subsidiary, and was financed entirely by Alcoa (App., 3a; R. XIV 3022). The total cost of the land, plant and equipment at Corona was $2.8 million (DXR 3; R. XIV 2937), none of which represented proceeds from the sale of Cupples' assets or profits earned by Cupples (R. XIV 3022). The Corona plant did not replace Cupples' existing facilities which were expanded and improved by Alcoa at a cost of $1,575,000 (App., 18a; GX 53, 54; R. XVIII 423, 425).

Though financed and owned entirely by Alcoa the Corona plant is not claimed to be wholly independent of Cupples. It was built to enable Cupples to serve the West Coast market,[4] and, since Cupples was to operate it, Cupples' personnel laid out the plant and supervised its construction (R. XIV 2980-2982, 3019-3022). This, however, could have been done by Alcoa which had previously built similar plants in other parts of the country (R. XIV 2929-2967; DXR 2-47). In addition, Cupples transferred 29 employees from its St. Louis plant to provide a nucleus for the Corona operating staff (R. XIV 2982-2987).

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[4] Prior to the acquisition, Cupples had considered building a West Coast plant. The record shows, however, that if Cupples had gone forward, its plant would have been on a substantially smaller scale than the one built by Alcoa at Corona (R. XIV 3015-3017). The district court, by providing that Corona may be divested separately from Cupples (App., 24a-25a), has implicitly rejected the Government contention that Corona should be divested because Cupples would have expanded to the West Coast on its own (Government Memorandum in Support of Divestiture of the Corona Plant, hereafter cited as Gov't. Mem., R. 4; R. XIII 2795, 2800).

Since its completion in August 1962, the plant has functioned strictly as a Cupples' operation, making aluminum curtain wall, store fronts, windows and doors (DXR 49; R. XIV 2988-2989). The anticipated West Coast market for these products has not materialized, and the Corona operation lost more than $2 million in its first two years (DXR 52; R. XIV 2995, 3027-3032).

3. The Proceedings Below

(a) *The Complaint.* The complaint charges that Alcoa's acquisition of Cupples may substantially lessen competition or tend to create a monopoly in the production and sale of primary aluminum and aluminum extrusions, residential and nonresidential windows, doors, door frames, entrances and curtain wall (R. I 6-7). The prayer seeks divestiture of Cupples and an injunction prohibiting Alcoa from acquiring the stock or assets of any other corporation engaged in the manufacture and sale of any of the above-listed products (R. I 7-8). At no time was the complaint amended to include an allegation that Alcoa's ownership of the Corona plant was in violation of law or to seek an order for the divestiture of that plant.

(b) *Preliminary Injunction.* On May 22, 1962, two years after the Government learned of Alcoa's plan to build a West Coast plant (GX 16, pp. 14-15; R. XVI 116; Pl. Ans. to Int. 1; R. II 312), and at least two months after construction of the plant had commenced (R. XIV 2980), the Government filed a Motion for Preliminary Injunction asking the court to restrain "defendants from taking any further action to build an Alcoa plant at Corona, California," and from further commingling of Alcoa's and Cupples' assets and personnel (R. I 214). In an Order and Memorandum

Opinion filed July 30, 1962, the court granted the requested relief against commingling (R. V 685-686), but refused to enjoin Alcoa from completing the Corona plant and rejected a Government request that the plant be deeded forthwith to Cupples (R. V 683). The court permitted Alcoa to carry out its expressed intention to lease the Corona plant to Cupples (*ibid.*), subject to the requirement that "the products made at that plant be sold and advertised as Cupples products" (R. V 686).

(c) *Trial and Decision on the Merits.* By the time of trial, the Government had abandoned its claim of anticompetitive effect with respect to primary aluminum and aluminum extrusions, residential windows, doors, door frames, and entrances. In addition, the parties had agreed that the United States as a whole was the relevant geographic market. Accordingly the contested issues were: (1) whether (a) metal curtain wall, (b) aluminum curtain wall, a submarket of (a), (c) metal nonresidential primary windows, and (d) aluminum nonresidential primary windows, a submarket of (c), were proper lines of commerce; and (2) whether Alcoa's acquisition of Cupples had the prohibited effect in any of such alleged lines of commerce (App., 7a-8a).

The court ruled as follows: It held that both metal and aluminum curtain wall were proper lines of commerce (App., 12a-13a), but that the Government had not sustained its burden of proof on the two alleged window lines (App., 24a). With regard to competitive effect, the court acknowledged that the Government did not claim elimination of actual or potential competition between Alcoa and Cupples or that the acquisition would effect a substantial foreclosure of Alcoa's pri-

mary aluminum-producer competitors (App., 7a). Thus, in the absence of traditional horizontal or vertical effects, the sole issue was whether Alcoa's ownership of Cupples was likely to impair competition in either of the two curtain wall lines of commerce. Finding that Alcoa's purpose in acquiring Cupples had been to get 40 per cent of the aluminum curtain wall business, that Alcoa had the power to achieve this objective, and that Alcoa's financial and technical resources conferred certain advantages upon Cupples (App., 17a-18a), the court held that the acquisition violated the statute and that, accordingly, Alcoa would "be ordered to divest itself of the stock of Cupples" (App., 24a).

Apart from describing briefly the preliminary injunction and noting its applicability to the Corona plant (App., 3a), the court's opinion on the merits made only passing reference to the Corona situation (App., 6a, 18a). It clearly did not purport to decide what disposition, if any, should be made of Corona, for its concluding sentence states that because of Alcoa's ownership of Corona, "a further hearing will be held to determine the proper method and the scope of the divestiture" (App., 24a).

(d) *The Hearings on Relief and Final Judgment.* The court held two hearings on the Corona question. At the first of these, held October 23, 1964, arguments were presented by counsel but no additional evidence was taken. At the close of this hearing, the court stated that it was not "well enough advised about [the Corona problem] at this point to enter a decree" (R. XIII 2881). Accordingly, a further hearing was held on November 24 and 25, 1964. Defendant's evidence showed that Corona had been extremely unprofitable and would be a liability rather than an asset to Cupples

(DXR 52; R. XIV 2995, 3027-3032); that the plant is a typical aluminum fabricating plant similar to others Alcoa had built and, therefore, was not the product of Cupples' "know-how" (R. XIV 2929-2967, 3019-3024; DXR 2-47); and that, if permitted to retain the plant, Alcoa could use it to fabricate a number of products not made by Cupples, such as aluminum anodized extrusions, coil sheet, roofing, siding, telephone booths, and beer barrels (R. XIV 2960-2975; DXR 43-47). The Government's evidence did not controvert the above but sought only to show that certain competitors of Cupples might be prejudiced if Alcoa retained the plant and continued to use it to make aluminum curtain wall, windows, and doors (R. XIV 3058-3119). At both hearings, counsel for appellants, though urging that Alcoa should be permitted to keep the plant without restriction, made clear that Alcoa would accept, as an alternative to divestiture, an injunction limiting its use of the plant (R. XIII 2871, 2883; R. XIV 3124-3126). Government counsel, though advocating divestiture, conceded that the Government's principal objective was to prevent Alcoa from using the Corona plant and Cupples' personnel and know-how as a means of entering into the manufacture of aluminum curtain wall and certain related products (R. XIII 2881-2882).

On December 4, 1964, the court entered its Final Judgment. Alcoa was ordered to divest itself of (1) all ownership of Cupples, which includes improvements to Cupples' original plants in excess of $1.5 million; and (2) all ownership in the assets located at Corona, California, which have been operated by Cupples (App., 24a-25a). Since the Judgment contemplates that Corona may be divested separately from Cupples, the court evidently rejected the Government claim that Corona

must be divested in order to reconstitute Cupples as a viable competitor. Beyond that, however, since no findings of fact, conclusions of law or opinion were filed relating to Corona, it is impossible to tell how the court resolved the factual issues presented in the relief proceedings or what standards, if any, it applied in requiring divestiture of Corona.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions concerning the formulation of equitable relief in Section 7 cases. It is appellants' position that the trial court's order requiring Alcoa to divest its after-created Corona plant must be set aside for two reasons: *First,* an important threshold error is the district court's failure to make findings of fact and conclusions of law as required by Rule 52(a), Federal Rules of Civil Procedure. This omission not only impedes review of the court's decision on relief but, in itself, constitutes reversible error. *Second,* as an examination of the record will show, the court erred in ordering divestiture of Corona since the public interest can be fully protected by less harsh measures.

I. THE DISTRICT COURT'S FAILURE TO MAKE FINDINGS REQUIRES REVERSAL AND A REMAND FOR FURTHER PROCEEDINGS.

Rule 52(a) requires that "the court shall find the facts specially and state separately its conclusions of law thereon." There are two reasons for this important requirement. First, findings of fact facilitate judicial review, for "prerequisite to such review is evidence that a judgment was in fact made, that the parties were heard on the issue, that the proper standards

were applied." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).[5] In addition, as stated by Judge Frank in *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir. 1942), the trial court's findings of fact have

> a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

Here, we submit, it would have been difficult—indeed, impossible—for the trial court to articulate valid grounds for divesting Corona (*infra*, pp. 16-21).

This Court's decisions leave no doubt that Rule 52(a) applies to the decision on relief, for "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation" *Gilbertville Trucking, supra*, 371 U.S. at 130. Indeed, this Court has repeatedly set aside remedial judgments where there were adequate findings on the merits but, as here, the court or agency had failed to explain its reasons for selecting a harsh remedy when some less severe alternative might have sufficied.[6] These deci-

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[5] See also *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964).

[6] *Gilbertville Trucking, supra*, 371 U.S. at 129-31; *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 126-29 (1948); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 165-70 (1962); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189-97 (1941).

sions require at least a reversal and remand for further proceedings in conformity with Rule 52(a). Such a remand is anything but "purely academic for the sake of procedural regularity," since, to say the least, "a doubt can be raised" as to the propriety of divestiture. *Gilbertville Trucking, supra,* 371 U.S. at 131.

(a) The Court Did Not Find That Other Remedies Would Be Ineffective

A "doubt" arises, first of all, because the district court ordered divestiture of Corona without first concluding that less drastic measures would not be "effective to restore competition." *United States* v. *E. I. duPont de Nemours & Co.,* 366 U.S. 316, 326 (1961). As this Court has held, it is the duty of the courts "to give 'complete and efficacious effect to the prohibitions of the statute' *with as little injury as possible to the interests of private parties or the general public,*" *Gilbertville Trucking,* 371 U.S. at 130 (emphasis added). Accordingly, divestiture, the "most drastic" of antitrust remedies, should be ordered only "[i]f the Court *concludes that other measures will not be effective to redress a violation . . .*" *duPont, supra,* 366 U.S. at 326-27, quoted in *Gilbertville Trucking, supra,* 371 U.S. at 130 (emphasis added). Here, the court has ordered Alcoa to divest its $2.8 million Corona plant without the necessary predicate, that is, without a prior conclusion that less drastic measures would not be effective to redress the violation. In fact, as is shown in Part II, the record would not support any such conclusion.

(b) The Corona Plant Is After-Created Property

Alcoa built and paid for the Corona plant long after the Cupples acquisition, and its ownership of Corona was not claimed or found to violate the Act. These facts cast further doubt on the validity of the court's decision on relief.

Section 7 does not prohibit internal growth, and neither its language nor the history of its enforcement suggests that divestiture is to be invoked against post-acquisition transactions that do not, themselves, violate the statute.[7] Indeed, heretofore the Federal Trade Commission and the courts have consistently refused to order diverstiture of after-acquired property except where it was a replacement for, or closely integrated with, unlawfully acquired assets.[8] Since the Corona plant does not meet these conditions, the court's order represents a new departure in Section 7 enforcement. For this reason, it was especially important that the legal and factual bases of the order be set forth in findings of fact and conclusions of law as required by Rule 52(a).

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[7] Cf. Section 11 of the Clayton Act which authorizes administrative agencies having Section 7 jurisdiction to issue an order requiring the offender "to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, *held . . . contrary to the provisions of Section 7 . . .*" 15 U.S.C. § 21 (Emphasis added).

[8] *United States* v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808-9 (D.D.C. 1958), *aff'd in pertinent part*, 362 U.S. 458, 472-73 (1960); *Crown Zellerbach Corp.*, 54 FTC 769, 806-8 (1957) *affirmed* 296 F. 2d 800 (9th Cir. 1961), *cert. denied* 370 U.S. 937 (1962); *Reynolds Metals Co.* v. *FTC*, 309 F. 2d 223, 230-31 (D.C. Cir. 1962); *Pillsbury Mills, Inc.*, 57 FTC 1274, 1412-15 (1960); *Union Carbide Corp.*, 59 FTC 615, 657 (1961).

Significantly, the district court recognized that Corona presented a special situation (App., 24a), and held two hearings for the express purpose of dealing with this novel problem of relief. In the absence of findings or conclusions, however, it is impossible to tell what weight was given to the evidence or what standards, if any, were applied.

Finally, there is sufficient doubt to require reversal and a remand for further proceedings because, as will next be shown, it is not only "conceivabl[e]," but virtually certain, that the effect of the Cupples acquisition "could . . . be discontinued without divestiture" of Corona *Gilbertville Trucking, supra*, 371 U.S. at 131.

II. THE RECORD DOES NOT ESTABLISH THE NEED FOR DIVESTITURE OF CORONA.

Normally, "it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 421 (1943). In this case, however, the district court's error can be so easily ascertained from the record, that this Court should interdict divestiture of Corona and remand the case with instructions to determine what other and different relief may be required in order to redress the violation. In any event, it is important to consider what the record shows, not only to demonstrate further that a "doubt" exists but to indicate questions to which the district court's particular attention should be directed upon a remand for further proceedings.

(a) Cupples Can Be Divested as a Viable Competitor Without Corona

The Government argued that retention of Corona by Alcoa would substantially diminish "the chances of Cupples developing into a viable independent fabricator . . ." (Gov't. Mem., p. 4; R. XIII 2800). It was shown, however, that the West Coast curtain wall market has not materialized, and that, as a result, the Corona plant has lost a substantial amount of money and would be a liability rather than an asset to the divested Cupples (DXR 52; R. XIV 2995, 3027-3032). The court evidently agreed that Cupples does not need Corona, for the Final Judgment contemplates that it may be divested separately from Cupples (App., 24a-25a). This conclusion is eminently correct, since before the acquisition Cupples, without Corona, was not only a viable competitor but was the leading producer of aluminum curtain wall (App., 22a-23a). If anything, its position will be even stronger after divestiture by virtue of Alcoa-financed improvements to its original plants in an amount in excess of $1.5 million (App., 18a; GX 53, 54; R. XVIII 423, 425).

(b) Divestiture of Corona Is Not Required in Order to Eliminate Competitive Benefits to Alcoa from the Cupples Acquisition

The second theme pursued by the Government was that Alcoa, if permitted to keep Corona, "would retain substantial, tangible gain as a direct consequence of the illegal acquisition." (Gov't. Mem., p. 2; R. XIII 2798). In meeting this contention, it is important to differentiate between (1) Aloca's mere ownership of Corona as an aluminum fabricating plant, and (2) Alcoa's possible use of the plant to compete in the

aluminum curtain wall business after divesting Cupples.

(1) *Corona, as an Aluminum Fabricating Plant, Is Not the "Fruit" of the Acquisition.* Evidence adduced at the second hearing on relief established that Alcoa's ownership of Corona was not in any meaningful sense the "fruit" of the acquisition. It is true that Cupples, which was to operate Corona, laid out the plant and supervised its construction. Beyond that, however, Alcoa selected the site, purchased the land, and paid for the plant and all machinery and equipment housed therein (R. XIV 2920-2925, 3017-3018, 3022). Furthermore, any implication that Cupples' "know-how" was essential, or even significant, in the creation of Corona, is emphatically refuted by the record.

Corona is not a unique, specialized facility but a typical light aluminum fabricating plant similar to others Alcoa has built in the past (R. XIV 2929-2967; DXR 2-47). Indeed, the incontrovertible evidence established that Cupples' expertise lay in the design of curtain wall installations; that it had no special capability in designing aluminum fabricating plants; that Alcoa could readily have designed and supervised the construction of Corona; that nearly all the equipment at Corona is standard aluminum fabricating machinery; and that Corona, with no significant modification, could make a wide variety of aluminum products. (R. XIV 2929-2975, 3019-3024; DXR 2-47). In sum, though built for Cupples to operate as a curtain wall facility, Corona is merely a standard aluminum fabricating plant and, as such, is essentially the "fruit" of Alcoa's own substantial post-acquisition investment. The court, of course, has not found to the

contrary. *Schine Chain Theatres, Inc.* v. *United States, supra,* 334 U.S. at 129.

(2) *Divestiture Is Not Required to Prevent Alcoa's Use of Corona in the Curtain Wall Field.* We respectfully submit that the Government's real concern is not with Alcoa's ownership of Corona *per se* but with its potential use of this facility, together with "Cupples' personnel and technology," as a means of entering into the manufacture of curtain wall and certain related products (Gov't. Mem., pp. 4, 10; R. XIII 2800-2806). Indeed, this was conceded by Government counsel in the following colloquy (R. XIII 2881-2882):

> THE COURT: Isn't your problem really as far as the Corona plant is concerned, that you don't want Alcoa to use that plant as a means of getting into the business? Isn't that what your problem is?
>
> MISS LINGREEN: *That is right.* But curtain wall is entirely too limited . . . . [I]t is a matter of not being able to use it with respect to any of the products made by Cupples— . . . windows and so forth. (Emphasis added.)

Obviously, divestiture, which forecloses Alcoa from using the Corona plant for *any* product, goes far beyond even the Government's stated objective.

In view of the above, it is not surprising that the court, itself, suggested the availability of injunctive relief. "I can envision a number of ways," it said

> where this problem can be taken care of without disposing of the Corona plant. This can be by enjoining Alcoa from employing any of the employees who are presently working out there. That is one way. Another is to prohibit them from

using it for curtain wall. (R. XIII 2865; see also 2854).

Appellants' counsel, though advocating retention of Corona without restriction,[9] repeatedly emphasized appellants' willingness to accept injunctive provisions that would deprive Alcoa of Cupples' know-how (R. XIII 2871) and effectively prohibit it from using the Corona plant in the aluminum curtain wall line of commerce (R. XIII 2883; R. XIV 3124-3126). Indeed, as noted, much of appellants' argumentation and proof in the relief proceedings was directed at showing that Corona is a typical fabricating plant that could be economically utilized to make a broad range of aluminum products not made by Cupples (R. XIII 2847, 2854, 2861-2862, 2878, 2896).[10]

Significantly, Government counsel did not advance a single reason why a proper injunction would not be sufficient. Rather, her objections went to the scope of the injunction, it being the Government's position that the prohibition should extend beyond aluminum curtain wall, the only line of commerce in which a violation was proved, to certain related Cupples' products, such as aluminum windows and doors (R. XIII 2854, 2866, 2882, 2884-2885; R. XIV 3135-3136). In support of this position, it was urged that to allow Alcoa to make windows and doors at Corona might adversely affect Cupples' competitors in those product lines, and

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[9] In previous cases, Section 7 violators had consistently been permitted to retain after-acquired assets without restriction. See note 8, *supra*.

[10] Among the products for which the Corona plant can be used are aluminum anodized extrusions, coil sheet, roofing, siding, telephone booths and beer barrels (R. XIV 2960-2975; DXR 43-47).

would create problems of enforcement since Alcoa, in violation of the proposed injunction, might "creep" from the aluminum window business into the forbidden curtain wall field. In response, appellants' counsel stated that "if there is an injunctive provision, it could be written . . . to see to it that" the danger foreseen by the Government "just does not occur" (R. XIV 3125).

Thus, though broader contentions were advanced by both sides, the real issue became one of the scope of an injunction limiting Alcoa's use of the plant. The court, without finding that injunctive relief was inherently inadequate and without attempting to formulate a workable injunction, avoided this issue by ordering divestiture.

(c) Divestiture of Corona Is Punitive, Not Remedial

"The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *duPont, supra,* 366 U.S. at 326. Accordingly, in the absence of proof that depriving Alcoa of its $2.8 million post-acquisition investment in Corona serves a necessary remedial purpose, such deprivation must be deemed punitive and, therefore, beyond the court's authority. Since no such finding has been or could be made on this record, the district court has not only failed to comply with Rule 52(a) but has disregarded established standards governing equitable relief in Section 7 cases.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are raised by this appeal and that probable jurisdiction should be noted.

HERBERT A. BERGSON
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
SAMUEL H. SEYMOUR

BERGSON & BORKLAND
888 17th Street, N.W.
Washington, D. C. 20006

WILLIAM K. UNVERZAGT
1501 Alcoa Building
Pittsburgh 19, Pennsylvania

Attorneys for Appellees

April 26, 1965

APPENDIX

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ALUMINUM COMPANY OF AMERICA and
CUPPLES PRODUCTS CORPORATION, *Defendants*.

No. 61 C 147(2).

United States District Court
E. D. Missouri, E. D.

Sept. 22, 1964.

Action under Clayton Act. The District Court, Meredith, J., held that acquisition of number one fabricator of aluminum curtain wall, with 16.6% of aluminum curtain wall market, by number one primary aluminum producer whose avowed purpose was to obtain 40% of aluminum curtain wall market could reasonably be expected to substantially lessen competition or tend to create monopoly in fabrication and sale of metal curtain wall and aluminum curtain wall, the relevant lines of commerce within United States, and would violate Clayton Act, but that government did not prove that corporation acquiring stock of another corporation had violated section of Clayton Act as to non-residential primary windows and aluminum non-residential primary windows.

Order accordingly.

See also D.C., 34 F.R.D. 241.

William H. Orrick, Asst. Atty. Gen., Edna Lingreen, J. E. Waters, and James F. Buckley, Attys., Dept. of Justice, Washington, D. C., and Richard D. FitzGibbon, Jr., U. S. Atty., St. Louis, Mo., for plaintiff.

Thos. S. McPheeters, Jr., Bryan, Cave, McPheeters & McRoberts, St. Louis, Mo., William K. Unverzagt, Pittsburgh, Pa., Herbert A. Bergson and Bergson & Borkland, Washington, D. C., for defendants.

MEREDITH, *District Judge.*

This matter was tried to the Court without a jury and is an action brought by the United States under Section 15 of the Clayton Act, 15 U.S.C. § 25, to enforce Section 7 of the Clayton Act, 15 U.S.C. § 18.

The defendants Aluminum Company of America (hereinafter referred to as Alcoa) and Cupples Products Corporation (hereinafter referred to as Cupples) transact business and are found within the Eastern District of Missouri.

Alcoa is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office in Pittsburgh, Pennsylvania. It is the largest domestic producer of primary aluminum. It is also engaged in the production and sale of semi-finished and finished aluminum products. Alcoa mines bauxite, an aluminum-bearing ore, in the United States and in certain foreign countries; it produces primary aluminum, intermediate aluminum products, and aluminum end products in several states in the United States and sells and ships such aluminum and aluminum products in interstate and foreign commerce.

Cupples is a corporation organized and existing under the laws of the State of Missouri, with its principal offices in St. Louis, Missouri. Cupples is and has been engaged in the fabrication of aluminum curtain wall, aluminum primary windows, and other aluminum products which it

sells and has sold in interstate commerce. This Court has jurisdiction.

Alcoa acquired all of the outstanding stock of Cupples on January 22, 1960, in exchange for Alcoa stock valued at $6,750,000.

The government filed its complaint on April 27, 1961. On May 22, 1962, the government moved for a preliminary injunction and on July 30, 1962, this Court entered an order enjoining defendants from any further consolidation or commingling of assets, personnel, pension plans and advertising. This order included the Corona plant in California, which was under construction by Alcoa for the Cupples operation. The defendants were required to operate the Corona plant as a part of Cupples and to advertise the products made therein as Cupples' products and not Alcoa's. This plant is now in operation. The cost to Alcoa was $4,390,628. The plant is now owned by Alcoa and is operated by Cupples.

Alcoa, Reynolds Metals Company, Kaiser Aluminum & Chemical Corporation, Ormet Corporation, Harvey Aluminum, Inc., and Anaconda Aluminum Company were the only domestic producers of primary aluminum in 1960. Their shares of total domestic primary aluminum production in 1960 were as follows:

Companies	Tons Short		Percent	
Aluminum Company of America	727,000		36.1	
Reynolds Metals Company	494,282		24.5	
Kaiser Aluminum & Chemical Corporation	488,077		24.2	
Subtotal		1,709,359		84.8
Ormet Corporation	189,514		9.4	
Harvey Aluminum, Inc.	59,000		2.9	
Anaconda Aluminum Company	56,625		2.8	
Subtotal		305,139		15.2
Total		2,014,498		100.0

The primary aluminum industry in the United States is a highly concentrated industry, with Alcoa, Reynolds Metals Company and Kaiser Aluminum & Chemical Corporation accounting for 84.8% of all the primary aluminum produced in the United States in 1960.

Alcoa accounted for 36.1% of all the primary aluminum produced by domestic producers in 1960.

In 1945 Alcoa was adjudged to have illegally monopolized the domestic primary aluminum industry, accounting for virtually one hundred percent of total production.

Final disposition of the monopoly case against Alcoa was deferred pending disposition of government-owned primary aluminum plants constructed during World War II.

The Surplus Properties Act of 1944 directed that surplus properties owned by the government be disposed of in such a manner and purpose as would foster competitive conditions in the aluminum industry.

Reynolds Metals Company and Kaiser Aluminum & Chemical Corporation entered the aluminum field as primary aluminum producers almost solely as a result of the government's disposal program.

Harvey Aluminum, Inc., and Anaconda Aluminum Company entered the primary aluminum industry with substantial aid from the government in the form of special tax credits and guaranteed loans.

With the entry of new producers into the market, domestic production of primary aluminum has increased from 1,246,912,000 pounds in 1948 to 4,235,856,000 pounds in 1962. 166,328,000 pounds were imported in 1948 and during 1962 this had increased to 615,042,000 pounds. Alcoa's share of the total domestic primary production in those years has been as follows:

	Percent		Percent		Percent
1948	52	1953	49	1958	33
1949	48	1954	46	1959	32
1950	49	1955	45	1960	36
1951	51	1956	45	1961	35
1952	50	1957	43	1962	32

In 1950 Alcoa's total assets were $575,342,747, and by 1960 its total assets had increased to $1,374,134,148. Its growth has been substantial. In 1960 it had net sales and operating revenues of $861,211,772 and ranked twenty-second in size among other American industrial corporations.

As the largest domestic producer of primary aluminum, Alcoa is completely integrated from mine to consumer. In 1960, in addition to its facilities outside the country, it had in the United States seven raw materials locations, six research laboratories, three refining locations, and twenty-six fabricating facilities located from Connecticut to California.

In 1960 Alcoa had 2,786 sales employees and the cost allocated to its sales force was $43,446,412. It has twenty-one district sales offices.

The building and construction industry was Alcoa's largest single market for aluminum in 1960, accounting for approximately twenty-five percent of total shipments.

Prior to the acquisition of Cupples, neither Alcoa nor any of its subsidiaries engaged in the fabrication of curtain wall or primary windows, but Alcoa was a supplier of aluminum to Cupples and others for use in making these and other building products.

On initial capital of $80,000, Cupples, as an aluminum fabricator, commenced operation in 1946 by fabricating and selling double-hung windows made partly of wood and

partly of aluminum. As it grew, Cupples extended its operations into fabrication of other types of aluminum architectural products, including various types of windows and curtain wall, and expanded its plant and facilities from one plant covering 32,000 square feet in 1946 to three plants, including a leased one, covering 283,000 square feet, immediately prior to its acquisition by Alcoa in 1960.

In 1959 the products produced by Cupples were: aluminum extrusions, aluminum primary windows, aluminum curtain wall, aluminum suspended ceiling systems, aluminum highway railings, non-residential aluminum doors, door frames and entrances.

At the time of its acquisition, Cupples had plans to expand to the west coast. Since the acquisition, Alcoa has financed the building of a plant for Cupples in Corona, California. Cupples today operates plants at St. Louis, Missouri; Dowagiac, Michigan; and Corona, California, at each of which it fabricates aluminum curtain wall and aluminum windows. These are not the only aluminum products created by Cupples, but they account for the significant portion of Cupples' sales.

Though not proved with precise nicety, insofar as it relates to a specified definition of curtain wall and non-residential windows, we have found the following to be a reasonably correct approximation of Cupples' total dollar net sales for the year stated and the approximate amount of dollar sales in those years attributed to aluminum curtain wall and to non-residential windows as Cupples and Alcoa define this product:

	Total Sales	Curtain Wall	Non-Residential Windows
1958	$13,768,547	$ 6,359,624	$3,200,000
1959	13,575,481	6,246,462	2,800,000
1960	15,196,611	9,426,551	2,300,000
1961	19,699,027	10,764,000	3,500,000

Cupples' assets in 1959 were $5,313,072 and in 1960 they were $7,881,216.

Cupples has sales offices throughout the United States and in 1960 it had 27 sales employees. The cost allocated to its sales force was in that year $196,708.

In 1959 Cupples' estimated demand for aluminum was 12,469,000 pounds, of which an estimated 8,008,000 pounds was used in the fabrication of non-residential windows and curtain wall.

Thus, so far we have given the relevant facts as we have found them with respect to the background of Alcoa and Cupples. The government, before trial, abandoned allegations in the complaint that the acquisition resulted in elimination of actual and potential competition between the two companies in the manufacture and sale of aluminum extrusions, the only product alleged to have been manufactured and sold by both Alcoa and Cupples. The evidence showed that Cupples' sales of extrusions were de minimis and thus not a factor. The government also abandoned its original allegation that the merger foreclosed the primary-aluminum-producer competitors from selling aluminum to Cupples.

The government's evidence was directed towards establishing that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly in the following product lines of commerce:

> (1) The fabrication and sale of metal curtain wall of which (2) aluminum curtain wall is a submarket and (3) the fabrication and sale of metal non-residential primary windows of which (4) aluminum non-residential primary windows are a submarket.

Section 15 U.S.C. § 18 reads in pertinent part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the

stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The parties here agreed, and the Court so finds, that the United States as a whole is the area to be affected, therefore, the questions to be decided by this Court are

(1) what are the lines of commerce and

(2) whether the acquisition of Cupples by Alcoa may tend to lessen competition substantially or tend to create a monopoly in any of the lines of commerce in the United States.

The Line of Commerce

A considerable amount of evidence focused on the meaning of curtain wall as the government sought to establish that the term itself was used and understood in the industry as synonymous with a metal type of framework used in the construction of an exterior wall, which is non-load bearing, but is attached to and supported by the structural framework of the building; while the defendants sought to show that the term curtain wall describes any non-load-bearing exterior wall. Within the antitrust dictionary "curtain wall" may be defined as an "end use".

The determination of what materials and what designs will be utilized for the construction of a building is made by the architect and the owner. While the owner's preference, if any, can be decisive, generally it is the architect who is responsible for materials and design and he must work within the owner's budget. An architect's

choice of materials and design for a non-load-bearing exterior wall is based on both aesthetics and costs. His decision must be based in part on the structural framework planned, for while a heavy strong structure will permit use of materials for non-load-bearing walls of any weight, a relatively light structural framework will not permit the use of the heaviest of materials in non-load-bearing walls. Initially, architects are the focal point for suppliers of exterior wall materials—stone, brick, granite, stainless steel, bronze, aluminum, wood, corten, carbon steel and precast concrete. Metal suppliers of non-load-bearing walls seek not only to have metal specified, but seek also to have such design specifications of that material designated as will permit their advantageous bidding once the general contract has been named. One such sub-bid may be for the non-load-bearing exterior walls.

If the architect determines to have the curtain wall in metal, he may not only specify the type of metal, he may, in addition, specify metal made by Alcoa, Reynolds, Kaiser or others. Further, he may likewise specify a design of a particular fabricator and may specify the fabricators who are acceptable as bidders, such as Cupples, Kawneer, General Bronze and others. He may also have an alternative metal; but if the non-load-bearing wall is to be in metal, other materials such as precast concrete will rarely be alternatively specified. The architect may also specify the color and finish of aluminum such as Alcoa's Duranodic or Kaiser's Kalcolor. When a certain manufacturer, fabricator or color and finish has been specified, the architect usually states "or equal" to indicate that an equivalent manufacturer, fabricator, or color and finish will be acceptable.

Once the architect has completed the design, his specifications are submitted either to general contractors for bidding or a general contractor is employed on a cost-plus or fixed-fee basis to obtain sub-bids. The sub-bids obtained

by the general contractor and his further negotiations thereafter with the sub-bidder form the basis of the general contractor's bid. If the architect has specified a metal design for the exterior non-load-bearing walls, usually only metal fabricators or metal assemblers will compete for the sub-contract. It is a rare instance when, for example, a precast concrete supplier will attempt to change the architect's specifications by submitting an alternative design and an alternative material of precast.

It is the foregoing general pattern of operation of the building industry in which curtain wall is sold.

Curtain wall in its broadest sense is an exterior non-load-bearing wall, which keeps out the elements and lets in light, and is attached to the structural framework of a building. Within its broadest meaning, it can be built of any material and its only engineering design characteristic is the fact that it is non-load-bearing.

When a metal frame is used as the basis for a non-load-bearing wall, it may be designed in a wide variety of different styles and forms and constructed of a great many different materials. The metal frame itself may be of a variety of designs. The frame may consist of (1) a series of interlocked panels, (2) a series of stacked and interlocked window frames and panels and (3) a grid system consisting of vertical structural members called mullions, to which are attached window frames. In a grid system, panels, known as spandrels, frequently are used to cover the space from the lower part of the window frame or sill to the upper part of the window frame itself. The latter grid system has become a popular metal type design for it permits a wide use of a variety of materials—aluminum, porcelainized enamel, glass, etc.,—within the metal outline.

The term "curtain wall" is well understood by both Alcoa and Cupples, even though it is not precisely defined. The metal fabricators in the business consider it to be a

non-load-bearing exterior wall in which metal is used as the principal framework of the system. The panels may or may not be of metal. It may or may not have mullions of metal.

In the catalogs published by Cupples before and after the merger, curtain wall was advertised. As far as Cupples is concerned, curtain wall means aluminum curtain wall.

The covering of a building is generally about five percent of the total cost of the building. There is, at the architect's level, competition between all types of building materials and particularly between precast concrete and aluminum. Both have about the same cost.

Once the architect has settled on a design for curtain wall, if it is determined to be in metal, the competition is between the various metal suppliers and fabricators. If cost is a dominant factor, aluminum is usually specified over other metals because it is cheaper than stainless steel, carbon steel, corten steel or bronze.

The metal fabricators who make curtain wall do not consider the precast concrete people to be their competitors. There is a separate trade association for metal, The National Association of Architectural Metal Manufacturers. The precast concrete suppliers are members of the Structural Clay Products Institute.

The principal product used in metal curtain wall today is aluminum. The evidence showed only two buildings using corten steel and two using bronze, one of the buildings using bronze has not been completed. Stainless steel has been used more frequently. Stainless steel in the metal line is the only real competitor with aluminum and aluminum has many advantages over stainless steel. Alcoa's study of costs shows aluminum curtain walls have an average cost of $6.26 per square foot and stainless steel an average of $9.69 per square foot. Bronze is more expensive than stainless steel.

Carbon steel requires periodic painting, aluminum does not. Aluminum may now be coated with an anodizing color process of Kalcolor or Duranodic in various shades of bronze, brown, onyx, and grey.

Because of its pliability, aluminum can be easily extruded into many forms, shapes, and sizes. This is not possible in the use of stainless steel. This very characteristic of aluminum is also a disadvantage when compared with stainless steel because it presents engineering problems of expansion and contraction not present in stainless steel. Aluminum is also more subject to acids in the atmosphere than stainless steel.

According to a survey by Alcoa, curtain wall accounted for the use of 43,231,000 pounds of aluminum in 1960 out of a total use of aluminum in architectural products of 135,723,000 pounds. This is certainly a substantial segment of commerce in the United States.

The total demand for aluminum used in curtain wall and the percentage of that demand which Alcoa supplied between 1955 and 1960 is as follows:

Year	Total Demand in lbs.	Alcoa %
1960	43,231,000	—
1959	41,594,000	30.1
1958	41,000,000	43.3
1957	38,000,000	34.6
1956	27,000,000	41.1
1955	19,000,000	58.9

The precise use of metal in curtain wall, other than aluminum, was not shown. However, it is evident from all the testimony that aluminum dominates the metal curtain wall market. Alcoa's study indicated that aluminum accounts for over ninety percent of the total requirements.

This Court finds that metal curtain wall is a line of commerce and that aluminum curtain wall is a well-defined

submarket therein and as such is also a line of commerce under Section 7.

In arriving at this conclusion, we must look to see what the Supreme Court has said in recent cases as it applies to the facts in this case.

In Brown Shoe Co. v. United States, 370 U.S. 294, l. c. 324, 82 S.Ct. 1502, l. c. 1523, 8 L.Ed.2d 510, the Court said:

> "[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined *only in terms of the market affected.*"

and l. c. 325, 82 S.Ct. l. c. 1523, 1524:

> "The outer boundaries of a product market are determined by the reasonable interchaneability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. * * *"

In this case the broad outer boundaries are "curtain wall" where all types of building materials compete. Within that outer market "metal curtain wall" and

"aluminum curtain wall" are meaningful product markets or "lines of commerce".

The industry recognizes "metal curtain wall" as distinct and different from precast or any other type of curtain wall. The customers are the building owners as they are guided by the architects and contractors. When an aluminum curtain wall is called for, the vendors of precast concrete, brick or stone are not called in to make a sub-bid. Only those vendors of aluminum. If some other metal is an alternate, then vendors of that metal are called in to make a sub-bid.

There are specialized vendors of metal curtain wall, who deal in both steel and aluminum or in steel, bronze and aluminum. But except for one vendor, Kawneer, who also owns a concrete company which is operated as a separate unit, metal vendors do not deal in concrete and concrete vendors do not deal in metal.

Production facilities for aluminum curtain wall are unique and specialized. The extrusion presses and the hard-coat finish with color such as Duranodic or Kalcolor require special and distinct facilities to produce.

The Court pointed out in U. S. v. E. I. Du Pont & Co., 353 U.S. 586, l. c. 593, 77 S.Ct. 872, 1 L.Ed.2d 1057, that "automotive finishes and fabrics" have sufficient peculiar characteristics and uses to constitute a "line of commerce" separate and distinct from all other finishes and fabrics. So do metal curtain walls and aluminum curtain walls.

What we are really determining are the "trade realities", U. S. v. Philadelphia Nat. Bank, 374 U.S. 321, l. c. 357, 83 S.Ct. 1715, 10 L.Ed.2d 915. The line of commerce may be a broad line of commerce as outlined by the Court in United States v. Continental Can Co., 84 S.Ct. 1738, page 1747, decided June 22, 1964.

> "* * * we hold that the inter-industry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete. * * *"

The line of commerce may be a narrow one. U. S. v. Aluminum Co. of America, 377 U.S. 271, l. c. 277, 84 S.Ct. 1283, l. c. 1287, 12 L.Ed.2d 314:

> "Thus, contrary to the District Court, we conclude (1) that aluminum conductor and copper conductor are separable for the purpose of analyzing the competitive effect of the merger and (2) that aluminum conductor (bare and insulated) is therefore a submarket and for purposes of § 7 a 'line of commerce.'"

What we are really finding in a line of commerce is an effective area of competition.

The Competitive Effects of the Acquisition

Who is engaged in the fabrication and erection of metal curtain wall and particularly in the use of aluminum in curtain walls?

There are more than one hundred firms ranging in size from very small firms to those of the size of Alcoa. In 1957 Alcoa's Commercial Research Division determined that eleven firms used 24,810,000 pounds of aluminum in the fabrication of curtain wall or 65.3% out of a total of 38,000,000 pounds used that year. Cupples accounted for 6,322,000 pounds or 16.6% of the total industry use.

Cupples, before the acquisition, was a leader in the fabrication and erection of aluminum curtain wall. It was in first place in 1957 with its nearest competitor in use of aluminum for curtain wall being Reynolds Aluminum Company, which used 3,400,000 pounds or 9% of the total.

The other large companies in the business as shown by Alcoa's survey are as follows:

Largest Aluminum Curtain Wall Fabricators
1957

		Aluminum Use for Curtain Walls (000 lbs.)		% of Industry Total
1st	Cupples	6,322		16.6
2nd	Reynolds	3,400		9.0
3rd	Valley Metal	3,050		8.0
4th	Michael Flynn	2,640		6.9
5th	Ludman	2,021		5.3
6th	General Bronze	1,400		3.7
7th	Flour City	1,365		3.6
8th	Adams and Westlake	1,240		3.3
9th	Marmet	1,210		3.2
10th	Fentron	1,150		3.0
11th	Browne Window	1,012		2.7
	Eleven largest fabricators		24,810	65.3
	All others		13,190	34.7
	Total		38,000	100.0

Three of the companies engaged in the fabrication of aluminum curtain wall in 1957 are no longer in that business (Reynolds, Ludman and Browne Window). In addition to those shown in the 1957 survey, the following are now substantial competitors of Cupples in aluminum curtain wall: Kawneer, Gridwall, Emrok, and Pittsburgh Plate Glass Co.

Only the large aluminum-curtain-wall fabricators have the financial resources, the engineering know-how and the experience to fabricate and erect aluminum curtain wall on large high-rise and multi-story buildings.

The smaller firms may compete successfully on the one, two and three story buildings in their own area, but beyond

that they fall by the wayside in competition with the large firms.

The defendants testified that the motive of Alcoa in acquiring Cupples was to benefit the entire building industry by having Cupples perform pilot operations which would inure to the benefit of all the building industry. This may be a partial statement of their motives, but it is not a defense to a Section 7 case. See United States v. E. I. du Pont & Co., supra, 353 U.S. l. c. 607, 77 S.Ct. l. c. 884, where the Court said:

> "* * * the fact that all concerned in high executive post in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended."

While we are examining the motive of Alcoa in acquiring Cupples, it may be well to look at a memorandum written by F. J. Close, the executive vice-president of Alcoa, on February 11, 1960, with copies to other officers of Alcoa in which he said:

> "I am completely aware of the financial situation confronting us but in view of what is going on in the building trades, I believe, and I am sure Mr. Schoetz and Mr. Chase as well as others in the sales department will support my belief, that it is essential that we move rapidly to establish ourselves as the leader in this business with the ultimate objective of getting at least 40% of all the business in those items which we would manufacture in the Cupples set-up."

In view of the avowed purpose of Alcoa to get 40% of the business of aluminum curtain wall by their acquisition of Cupples, this would mean that Cupples would have to

increase their 16.6% to 40% to attain this goal. Does Alcoa have the power to increase this percent in Cupples? This Court is of the opinion it does. If they have the power to do this, will they? This Court is of the opinion they will if Alcoa continues to own Cupples. If Cupples achieves 40% of the aluminum curtain wall business, it will then remove some of the smaller companies completely from this line of commerce and the larger ones will have a difficult time competing with the combination of Cupples and Alcoa.

In reaching such a conclusion, the evidence shows that by being a subsidiary company of Alcoa, Cupples enjoys many advantages not possessed by their competitors in the field. Among those advantages is the ability to obtain unlimited funds.

Cupples' indebtedness to Alcoa increased from $785,571 as of December 31, 1959, to over $10,000,000 in September of 1963. Prior to the acquisition Cupples had no difficulty in obtaining funds that they needed to expand through their parent company and through normal commercial channels. However, not to the extent which they have now obtained funds from Alcoa. For example, in 1958 Cupples Company Manufacturers, the parent of Cupples, alloted $300,000 for capital expenditures to Cupples to be used over a period of five years. Since the acquisition by Alcoa, Cupples spent $1,575,000 for expansion at St. Louis, Missouri, and Dowagiac, Michigan, and the Corona, California, plant cost $4,390,628.

Nothing would prevent Alcoa from permitting Cupples to operate on a break-even basis or even a loss basis for an extended period of time and at the same time make a profit on the aluminum sold by Alcoa to Cupples so that the overall operation would be at a profit.

The tendency of building owers is to require a guarantee on aluminum curtain wall for a period of five to twenty years.

Alcoa's financial reputation in relation to giving guarantees on large curtain wall jobs inures to the benefit of Cupples because a prospective purchaser of curtain wall would much rather have this guarantee than the guarantee of a smaller company. In addition, the reputation of Alcoa in solving engineering problems in aluminum makes a guarantee from Cupples more attractive than a guarantee from a company not affiliated with a primary producer.

The evidence shows that Alcoa now furnishes their engineering know-how and skill to Cupples, as well as to Cupples competitors, and that new developments are being promoted with all fabricators on an equal basis. While this is true at the present time, there is no assurance that in the future Cupples will not be given advance information on new developments that will render other fabricators powerless to compete with Cupples. It does not seem unreasonable that Alcoa in the future would put all the aluminum curtain wall business possible into Cupples instead of the 40% which they announced as their intention when acquiring Cupples.

Alcoa has recently started to invest in real estate projects in various parts of the United States. Included in their investments are: (1) Century City in Los Angeles—total contribution in cash and guarantees $30,200,000; (2) United Nations Plaza, New York—total contribution $6,000,000—future contribution not to exceed $4,000,000 more; (3) Kratter Corporation, New York—$1,000,000 loan; (4) Mansion House, St. Louis, Missouri—$600,000 loan; (5) Allegheny Center, Pittsburgh, Pennsylvania,—contributions, loans and guarantees $2,000,000 to $3,000,000; (6) Baychester Housing Development—loans and contributions $5,300,000; (7) Golden Gateway project, San Francisco, California—loans and contributions $2,500,000.

The purpose of these investments is to make a return on capital. It also provides a means of promoting the use of aluminum in the building industry. Only Alcoa

aluminum is used in these projects where aluminum is called for. Cupples, as well as Cupples competitors, has supplied the extruded products to date in these real estate projects. Cupples could reasonably be expected to supply more of the aluminum in the future than its competitors because of the ownership of Cupples by Alcoa. In fact, if a suit was not pending it would be reasonable to find that Cupples would get all this business.

Alcoa sells aluminum to jobbers at a lower price than it sells to fabricators. The evidence is that Alcoa now sells to Cupples at the same price it sells to other fabricators. Nothing would prevent Alcoa in the future from selling to Cupples at jobber prices, which would put Cupples in an even more advantageous position than other fabricators.

Alcoa through the years has acquired a reputation with architects and builders as a pioneer in new developments. They spend large sums of money to advertise in trade magazines and on television, and in promoting expense-free trips to the home office by various persons in the trade, such as architects and builders, to show them new processes. Now, as a subsidiary of Alcoa, this prestige benefits Cupples. Cupples on its advertising and catalogs promotes itself as a subsidiary company of Alcoa.

Cupples today is the only aluminum fabricator that is owned by a primary producer, except for Amarlite Company, which was acquired in 1960 by Anaconda Aluminum Company, the smallest of the primary producers which has only 2.8% of the primary market.

Certain sizes, shapes and patterns for aluminum curtain wall are extruded from dies which are expensive and which are owned by Alcoa. At the present time these dies are made available to all of Alcoa's customers, including the competitors of Cupples, provided the aluminum is purchased from Alcoa. It would be reasonable to assume this

will continue as long as Cupples uses only 16% of the aluminum in curtain wall because Alcoa does not want to lose the other business. But what would Alcoa do when Cupples achieves 40% of the market? Or more than 40%? Would not Alcoa use its advantages to help Cupples and to thereby help itself? This Court is of the opinion that it would.

Duranodic finish adds a hard coat and color which makes aluminum attractive as a curtain wall material. It costs $100,000 or more to establish this process. Cupples is one of the companies licensed by Alcoa to use Duranodic. The Kalcolor licensed by Kaiser is another color process which competes with Duranodic finish. Because of its cost a small company is not able to install this process. With out color finish on aluminum, a firm cannot successfully compete in the aluminum curtain wall market.

With all of the foregoing facts, what are the tests the Court must apply in making a determination of the competitive effect of an acquisition?

In A. G. Spalding & Bros., Inc., v. F. T. C., 301 F.2d 585 (C.A.3d), l. c. 625, the Court said:

> "Under Section 7 of the Clayton Act the Government is not required to show that competition has been or is being restrained or that monopoly exists. The legislation was contrived as a preventive measure to eliminate the proscribed activities before they became operative. * * *
>
> " * * * the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. * * * "

The motive in the acquisition is important. Here the purpose of acquiring 40% of the aluminum curtain wall market has been clearly expressed. In United States v.

Paramount Pictures, 334 U.S. 131, l. c. 174, 68 S.Ct. 915, l. c. 937, 92 L.Ed. 1260, the Court said:

> " * * * In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. * * * ".

In the Brown Shoe case, supra, 370 U.S. at page 344, 82 S.Ct. at page 1534, the Court said:

> " * * * But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

In Transamerica Corp. v. Board of Governors, 206 F.2d 163, l. c. 169, the Court said:

> "A monopoly involves the power to raise prices or to exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary for the Board to find that Transamerica has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. * * * "

It seems to this Court, and we so find, that the acquisition of Cupples, the number one fabricator of alu-

minum curtain wall, with 16.6% of the aluminum curtain wall market, by Alcoa, the number one domestic producer of primary aluminum, with 36.1% of the primary aluminum market, with Alcoa's avowed purpose to obtain 40% of the aluminum curtain wall market in Cupples, can reasonably be expected to substantially lessen competition or tend to create a monopoly in the fabrication and sale of metal curtain wall and aluminum curtain wall, the relevant lines of commerce within the United States. Thus, we find a violation of Section 7 of the Clayton Act.

In considering the line of commerce of metal curtain wall and aluminum curtain wall, in most instances the metal and aluminum windows are an integral part of the curtain wall system.

The Court is of the opinion on the evidence before it that there is no real or clear distinction between residential primary windows and non-residential primary windows, whether made of aluminum or other metal. The evidence shows that so-called aluminum non-residential primary windows are used in residences and that so-called aluminum residential primary windows are used in high rise apartments and other commercial buildings.

Residential and non-residential windows made of aluminum are both stocked. This may be done by stocking aluminum "sticks", which may be fabricated into a window by cutting the stick into various lengths, and fastening it together to make the outer frame of the window. Stocking the windows may also be done by keeping in stock the finished windows.

Aluminum and metal primary windows are sold by the fabricator to hardware stores, dealers who deal in lumber or other materials, contractors, builders and a variety of other purchasers. There are no distinct customers. They are not custom-made like curtain wall for a specific building.

Almost every dealer in building supplies is in the aluminum window business. To get into the business does not

require the plant facilities required for curtain wall. This can be accomplished with a small shop, a few tools, and the purchase of aluminum sticks for the finished windows.

The fabrication of aluminum windows can be done with a small outlay of capital and a very few dies. There are no distinct production facilities required for either non-residential windows or residential windows.

As to the lines of commerce of metal non-residential primary windows and aluminum non-residential primary windows, the government has not met its burden of proof.

Alcoa will be ordered to divest itself of the stock of Cupples. Because of the ownership of the Corona, California, plant by Alcoa, which is being operated by Cupples, a further hearing will be held to determine the proper method and the scope of the divestiture.

Final Judgment

This Court having conducted a trial as to plaintiff's complaint and having rendered its findings of fact and conclusions of law thereon, dated September 22, 1964, and having had a further hearing on November 24, 1964, relating to the entry of a final judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The acquisition of the stock of defendant Cupples Products Corporation (Cupples) by defendant Aluminum Company of America (Alcoa) is in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

2. Within one year from the date of the entry of this final judgment defendant Alcoa shall:

(1) divest itself of all right, title and interest in the assets (including all the real estate) which are

located at Corona, California, and which have been operated by defendant Cupples; and

(2) divest itself of all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples;

3. Within sixty (60) days from the date of entry of this final judgment, defendant Alcoa shall submit to this Court for approval and to the plaintiff a detailed plan setting forth the manner by which defendant Alcoa proposes to accomplish the divestiture ordered in paragraph 2 hereof and a report stating the efforts made by defendant Alcoa to accomplish said divestiture. Within thirty (30) days after this submission, plaintiff shall notify the defendants of its objections, if any, to this plan. In the event that there are any such objections, the parties shall confer and, if they cannot thereby resolve their differences, a hearing will be held and the differences resolved by this Court. Divestitures shall then be accomplished by defendants in accordance with the plan approved by the Court.

4. The divestiture ordered in paragraph 2 hereof shall be made in good faith as a going business, shall be absolute, unqualified, and unconditional and to a person or corporation in which defendant Alcoa does not own stock or financial interest;

5. The Order entered by this Court on July 30, 1962, shall remain in effect, subject to further order of this Court, *Provided, however,* that nothing contained therein shall prohibit defendant Alcoa from selling or conveying any of Cupples' stock, share capital or assets under the plan of divestiture approved by this Court pursuant to paragraph 3 of this final judgment.

6. Defendant Alcoa shall pay all taxable costs;

7. Jurisdiction is retained to enable any of the parties to petition for such further and different relief as may be

necessary or appropriate to accomplish the terms of this final judgment or as may be necessary or appropriate for the construction or carrying out of this final judgment, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated this 4th day of December, 1964.

/s/ JAMES H. MEREDITH
UNITED STATES DISTRICT JUDGE

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 84

ALUMINUM CORPORATION OF AMERICA AND CUPPLES PRODUCTS CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court, which held that appellant Aluminum Company of America ("Alcoa") violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring in 1960 all the stock of Cupples Products Corporation ("Cupples"), and directed divestiture. The appeal presents only a single narrow issue as to the scope of divestiture.

The government's complaint, filed on April 27, 1961, sought divestiture of Cupples to a person other than an integrated aluminum producer, to assure Cupples' "continued independent operation"; injunctive relief against certain further acquisitions by Alcoa; and "such other and further relief as the Court may deem just and proper."

1. THE COMPANIES INVOLVED

Alcoa, the nation's largest producer of primary aluminum, accounted for 36.1 percent of such production at the time of the acquisition (J.S. 4a). The industry is highly concentrated. In 1960, there were only six domestic producers of primary aluminum, three of which (Alcoa, Reynolds Metals Company and Kaiser Aluminum & Chemical Corporation) accounted for nearly 85 percent of the nation's production (J.S. 3a). See *United States* v. *Aluminum Company of America,* 377 U.S. 271, 277–278. Prior to the acquisition, Alcoa had 26 fabricating facilities throughout the United States, but none of these produced aluminum curtain wall or windows, the principal business of the acquired company (J.S. 5a). Curtain wall is a non-load bearing wall attached to the structural framework of a building. It is designed to keep out the elements and to enable light to enter the building, and is generally composed of panels and window sections (J.S. 5, n. 3).

Cupples is engaged in the fabrication of aluminum curtain wall, aluminum windows and other aluminum products. At the time of the acquisition, its annual

sales were about $14 million, of which about $6½ million were of curtain wall (J.S. 6a). Cupples was the largest fabricator of aluminum curtain wall in the country, with 16.6 percent of the national output.[1]

At the time of the acquisition, Cupples owned and operated fabricating facilities in St. Louis, Missouri, and Dowagiac, Michigan, and had plans to construct a plant on the West Coast (J.S. 3a, 6a). After the merger, Alcoa invested more than $1.5 million in Cupples' existing plants, and financed the building of a $2.8 million fabricating plant for Cupples in Corona, California (J.S. 7, 6a).

In 1962, approximately a year after it filed the complaint, the government sought a preliminary injunction against any further construction of the Corona plant. The district court found that Cupples had designed and was supervising construction of the Corona plant for Alcoa, and that Alcoa's "decision that the West Coast plant should be clearly identified as an Alcoa plant and that Alcoa would finance the plant and would hold the title to the plant through Gateway Properties, Inc., its wholly-owned subsidiary, created for that purpose, was made in view of the risk that if it were a Cupples-owned and financed plant and if the acquisition of Cupples is determined a violation of § 7 of the Clayton Act and divestiture decreed, the West Coast plant would be

[1] The 11 largest aluminum curtain wall fabricators produced 65.3 percent of the 1957 industry total; Cupples accounted for more than 25 percent of the production of those 11 firms (J.S. 16a).

subject to divestment" (R. V 675).[2] Although the court refused to enjoin any further construction and permitted Alcoa to retain title to the Corona plant *pendente lite,* it required that "this plant shall be operated by Cupples and the products made therein shall be Cupples products and shall be sold and advertised as Cupples products (R. V 686).[3] At the time of the decision below, Cupples was fabricating aluminum curtain wall and windows at St. Louis, Dowagiac and Corona (J.S. 6a).

2. THE DECISION OF THE DISTRCT COURT

After trial, the district court held that the acquisition violated Section 7 of the Clayton Act because

[2] Appellants have indexed the record as follows: Volumes I through XII contain pleadings, motions and stipulations prior to trial; Volumes XIII and XIV contain the hearings on relief; Volume XV contains the papers relating to the docketing of the appeal in this Court and the district court order permitting closing of the Corona plant. The pages are numbered consecutively beginning with the government's complaint (Volume I, pp. 1–9) through the order authorizing Corona to be closed (Volume XV, pp. 3190–3191). Volumes XVI through XXXVI contain the transcript of the trial. "R.—" refers to the above pagination of the record on file in this Court, the roman numeral indicating the volume.

[3] The quotations are from the memorandum opinion and order of Judge Meredith, entered on July 30, 1962. The court's order (R. V 685–686) also enjoined Alcoa and Cupples from commingling or consolidating any of their operations, assets, pension plans, employees, etc. On April 16, 1965, upon Alcoa's motion asserting that there were continued and increasing losses from the Corona plant, the order was modified to permit closing of the Corona plant, provided that Alcoa maintain the plant "in good condition capable of being reactivated promptly" (R. XV 3191).

of its impact upon competition in two lines of commerce: "metal curtain wall" and "aluminum curtain wall."[4] The court found that Alcoa's "avowed purpose" in acquiring Cupples was to obtain 40 percent of the aluminum curtain wall business; that Alcoa has the power to increase Cupples' share of the market from 16.6 percent to 40 percent (J.S. 17a–18a); and that Alcoa would achieve that—or a greater—share of the market if it retained Cupples, because of various economic advantages arising from Alcoa's position as a primary producer and its financial strength (J.S. 18a–20). The court found that such a development would mean elimination of some of the small companies as competitors of Cupples in the aluminum curtain wall business and would render it more difficult for larger companies to compete effectively (J.S. 18a). Accordingly, the court held that the acquisition of "the number one fabricator of aluminum curtain wall" by "the number one domestic producer," with the above-stated purpose, "can reasonably be expected to substantially lessen competition or tend to create a monopoly in the fabrication and sale of metal curtain wall and aluminum curtain wall, the relevant lines of commerce within

[4] The court found that curtain wall was the broad product market and that, within those outer boundaries, metal curtain wall and aluminum curtain wall were "meaningful product markets or 'lines of commerce'" (J.S. 8a–15a). It also found, as the parties had agreed, that the entire United States was the relevant market (J.S. 8a). The court held that the government had not met its burden of proving that metal or aluminum nonresidential windows constituted lines of commerce (J.S. 24a).

the United States" (J.S. 22a–23a). The court concluded (J.S. 24a):

> Alcoa will be ordered to divest itself of the stock of Cupples. Because of the ownership of the Corona, California, plant by Alcoa, which is being operated by Cupples, a further hearing will be held to determine the proper method and the scope of the divestiture.

3. THE DIVESTITURE PROCEEDINGS

After rendering its opinion, the district court conducted hearings to determine whether to order divestiture of the Corona plant. The government proposed that Alcoa should transfer the Corona plant to Cupples, and then divest itself of the Cupples stock. It urged that a prospective purchaser of Cupples might want the Corona plant, and that the Corona plant was a "fruit of the acquisition" (R. XIII, 2802–2803, 2839, 2864, 2885; R. XIV 3130–3137). Alcoa asserted that it should be permitted to retain the Corona plant. The president of Cupples testified that the Corona plant was not an economic success and would not be desirable as part of a divested Cupples (R. XIV 3017, 3028).

On December 4, 1964 the court entered a final judgment requiring Alcoa to divest (1) "all right, title and interest in the assets (including all the real estate) which are located at Corona, California, and which have been operated by defendant Cupples" and (2) "all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples" (J.S. 24a–25a).

ARGUMENT

Appellants do not challenge the district court's rulings that Alcoa's acquisition of Cupples was illegal and that divestiture is the appropriate remedy. They contend only that the district court should not have ordered Alcoa to divest, in addition to the Cupples stock, the Corona fabricating plant, which it built for Cupples after the acquisition. We submit that the district court correctly required Alcoa to divest the Corona plant, and that this narrow issue as to the scope of the divestiture order in this case does not warrant plenary consideration by this Court.

1. Contrary to appellants' contention (J.S. 11–12, 17), the judgment does not give Alcoa a free choice between divesting the Corona plant separately or as part of the Cupples operation. On the contrary, it requires Alcoa initially to offer all three plants for sale and to permit a purchaser, if he wishes, to acquire as a going concern all the facilities that Cupples had while Alcoa owned it.

Paragraph 2 of the judgment provides (J.S. 24a–25a):

> Within one year from the date of the entry of this final judgment defendant Alcoa shall:
>
> (1) divest itself of all right, title and interest in the assets (including all the real estate) which are located at Corona, California, and which have been operated by defendant Cupples; and
>
> (2) divest itself of all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples;

Paragraph 3 of the judgment directs Alcoa within 60 days to submit a detailed plan setting forth the manner in which "Alcoa proposes to accomplish the divestiture ordered in paragraph 2 hereof" (J.S. 25a). Paragraph 4 provides that "the divestiture ordered in paragraph 2 hereof shall be made in good faith as a going business" and subject to certain conditions (*ibid*).

In short, the decree aims at reconstituting Cupples "as a going business" and it contemplates that divestiture of the plant at Corona which Alcoa built, as well as of the stock of Cupples which Alcoa owns, may be essential to achieve such result. The fact that the court rejected the government's proposal that Alcoa should be required first to transfer the Corona plant to Cupples and then to divest the Cupples stock, does not show that the court intended to give Alcoa complete discretion to decide whether to divest the Corona plant separately from the Cupples stock. The court so acted after Cupples' president testified that in his view the Corona plant was not presently economically desirable for Cupples. In these circumstances, and in view of the other provisions in the judgment which refer to "the divestiture" ordered in paragraph 2, the court's rejection of the government's suggestion would appear to involve no more than a decision to give a prospective purchaser the freedom to buy the Cupples stock with the Corona plant or without it.

Requiring Alcoa to offer the three Cupples plants initially as a single unit is important to accomplish a divestiture that will restore to the industry the com-

petition that was eliminated by the Cupples acquisition. As we discuss below, the record shows and the district court found that the Corona plant was built and intended to be used as an integral part of the Cupples business. Although the plant has now been shut down, it does not follow that a prospective purchaser of Cupples would not want the option of acquiring the plant together with the two other plants that Cupples presently is operating. Indeed, at the time of the acquisition Cupples itself had plans to construct a plant on the West Coast, and a prospective purchaser might well consider an existing facility in that area to be an important asset of the Cupples business. Furthermore, prospective purchasers might be reluctant to buy Cupples if they knew that Alcoa still retained the Corona plant, which was constructed with Cupples know-how and which Alcoa might use in competing against them in the fabricating business. Even assuming that Alcoa were enjoined from using the Corona plant for making curtain wall and/or related products, the potential for inflicting competitive injury that this plant represented as long as it remained in the hands of Alcoa might chill the interest of prospective purchasers of Cupples.

Of course, it may be that no prospective purchaser of Cupples would want the Corona plant, or would be willing to buy Cupples if he also had to take that plant. If that ultimately should be the case, Alcoa could then of course dispose of the Corona plant separately or it could seek modification of the judgment to permit it to retain the Corona plant subject to suit-

able restrictions upon its use that would adequately protect an independent Cupples. The Department and the district court would consider the problem in the light of the conditions then existing. But at the present time, when the process of divestiture is just getting under way, the most effective method of accomplishing divestiture—a step whose appropriateness Alcoa does not challenge—obviously is to give prospective purchasers the option of acquiring all three Cupples plants. That is precisely the opportunity that the divestiture order of the district court provides.

Further support for this obviously sensible inclusion of the Corona plant in the order of divestiture is furnished by the settled principle that antitrust violators may be deprived of the fruits of their illegal conduct. The district court's findings and the supporting evidence fully establish that the Corona plant was one of the "fruits" of Alcoa's acquisition of Cupples.

a. There is no significant disagreement as to the relevant facts on this issue. Alcoa paid for the construction of the Corona plant and took legal title to the land and equipment. Alcoa concedes (J.S. 7) that the Corona plant "was built to enable Cupples to serve the West Coast market," that "Cupples' personnel laid out the plant and supervised its construction," and that Cupples' employees were transferred "to provide a nucleus for the Corona operating staff." The district court so found in its memorandum on interlocutory relief (R. V 669–684) and the president of Cupples, Charles C. Moran, so testified at the hearing on the scope of divestiture.[5] At the

[5] Mr. Moran testified that prior to construction of Corona, Cupples was unable to compete effectively in the sale of curtain

hearing below, Alcoa's counsel admitted that the "chances are" that Alcoa would not have built the plant had it not been for the acquisition of Cupples (R. XIII 2875).

The fact that the Corona plant was intended to be a Cupples operation is not negated by Alcoa's financing or retention of title. Alcoa also made expenditures for additions and improvements to Cupples' facilities in St. Louis and Dowagiac, the divestiture of which it does not challenge. As to title, the district court explicitly found (in granting interlocutory relief) that Alcoa had intended to lease the plant to Cupples and that it retained title only to avoid the "risk" that the plant "would be subject to divestment" as a part of Cupples (R. V 675, quoted *supra*, pp. 3–4).

The court's findings were solidly supported by the appellants' own evidence at the 1962 hearing on interlocutory relief. Affidavits of Mr. Moran, Cupples' president, and of M. M. Anderson, Alcoa's executive

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wall on the West Coast because shipping costs were prohibitive (R. XIV 3025); that the company would have built a curtain wall fabricating plant on the West Coast had it not been for the acquisition (R. XIV 3016); that Cupples selected the Los Angeles area as the general location for the new plant (R. XIV 3049); that Alcoa requested Cupples' concurrence in the choice of Corona, California as the specific site (R. XIV 3017–3018); and that Cupples contracted to supervise the construction, layout and installation of machinery at Corona (R. XIV 3019). The hearing also disclosed that 29 employees from Cupples' St. Louis plants, including several employees who formed the "nucleus of the then existing Cupples organization" (R. XIV 2990), were transferred to Corona to supervise construction, engineering, production and sales at the new facility (R. XIV 2984–2985).

vice president, showed that the Corona plant was intended to be an integral part of the Cupples' operation. Moran stated that:

> While title to the [Corona] facility is vested in Gateway [an Alcoa subsidiary], it is and has been my understanding that upon completion the plant will be leased to Cupples and operated and known as a Cupples facility. All products to be fabricated at the West Coast plant will be sold by the Cupples sales organization under the same name and in the same manner as products now made in the Cupples plants in St. Louis, Dowagiac * * *. In short, business done at or through the West Coast plants will be Cupples business. All personnel who will staff and operate the West Coast plant will be Cupples employees and will remain on the Cupples payroll. [R. II 309–A.]

Mr. Anderson expressed Alcoa's agreement with Moran's understanding:

> The management and operation of these facilities will be completely in the hands of the officers and employees of Cupples. The products fabricated at the plant will be sold by the Cupples sales organization under the Cupples name and for its own account, the same as are products of the Cupples plants in St. Louis, Dowagiac * * *. All customers served by the facilities in Corona will be customers of Cupples. [R. II 309–F.]

Anderson's affidavit also explained why Alcoa had retained title to the plant:

> In view of the pendency of this litigation and the risk that, if the Government succeeded in

> having Alcoa's acquisition of the capital stock of Cupples declared to be a violation of Section 7 of the Clayton Act, this Court might possibly require Alcoa to divest itself of the stock of Cupples, prudent business discretion required that the new and separate facility to be built at the Corona site, to be financed by Alcoa, not be brought within Cupples' ownership so as to subject it to the possibility of divestiture. Accordingly, it was decided that the West Coast plant should be clearly identified as the property of Alcoa. [*Ibid.*]

Thus, Alcoa sought to gain a commanding position in the curtain wall business through acquisition of Cupples, and it believed that one method of assuring continued participation in the industry, even if it were later ordered to divest its interest in Cupples' other facilities, would be to retain title to the new curtain wall plant.[6] In these circumstances, we submit that Alcoa's development and ownership of the Corona plant was plainly attributable to, and resulted from, the acquisition of Cupples. It was one of the "fruits" of the illegal acquisition (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 152, 172). Divestiture of Corona is necessary since Alcoa "should,

[6] The record shows that Alcoa at one time contemplated the possibility of taking title to the building extensions and equipment at the St. Louis and Dowagiac facilities "in view of possible divestiture proceeding" (GX 57). However, accounting considerations caused Alcoa to discard this possibility (*ibid.*) and as a result ownership of the additions and improvements was vested in Cupples. Thus had it not been for practical considerations, Alcoa would have attempted to avoid an order requiring any divestiture whatever of its investment in Cupples' assets.

so far as practicable, be denied future benefits from [its] forbidden conduct" (*United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 89).

b. Alcoa contends (J.S. 18), however, that the Corona plant should not be considered a "fruit" of the acquisition, since it is an ordinary aluminum fabricating plant similar to others Alcoa has built and could have been constructed without Cupples' aid. But the fact is that it was not so constructed. Corona was built under Cupples' supervision for the purpose of use in Cupples' line of business as part of the Cupples firm—in short, it was plainly a result of the acquisition. Moreover, there seems little doubt that the plant embodies Cupples know-how, at least in layout and design (as distinguished from particular items of machinery). The value of this know-how is shown by Alcoa's desire to acquire and use it; by the evidence that several firms had sought to enter the curtain wall business and failed because of lack of know-how (R. XIV 3079–3082);[7] and by Moran's testimony indicating that other aluminum fabricating plants are not immediately adaptable to production of curtain wall.[8] Alcoa's original purpose in retaining Corona, as a means of staying in the

[7] Among the companies that failed was Reynolds Metals Company (R. XIV 3081, 3082), the country's second largest primary aluminum producer (J.S. 3a).

[8] Moran testified that Alcoa's New Kensington, Pennsylvania, fabricating facility could be adapted to curtain wall production in "two months" although curtain wall could not be manufactured as "efficiently" at New Kensington as it is at Cupples' St. Louis curtain wall plant (R. XIV 3046).

curtain wall business, is the surest confirmation that Corona is not interchangeable with Alcoa's 26 other fabricating plants.

2. Alcoa further contends (J.S. 19–21) that divestiture is unnecessary and punitive because any anticompetitive effects resulting from Alcoa's acquisition of Cupples' know-how can be cured by an injunction limiting Alcoa's use of the Corona plant. The short answer is that no injunction, however broad in scope, will or can provide as effective relief as divestiture of the Cupples' portion of the business.[9]

As we have shown, the decree properly requires Alcoa to give prospective purchasers of Cupples the opportunity also to acquire the Corona plant because

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[9] While Alcoa now suggests the possibility of an injunction prohibiting it from fabricating at Corona any of the principal products manufactured by Cupples, in the district court it proposed only an injunction against making curtain wall, but permitting it to make windows and other Cupples products. Alcoa there urged that any potential anticompetitive effects could be cured by an injunction prohibiting it "from using the Corona plant in the aluminum curtain wall line of commerce" (J.S. 20). There is no doubt that, on the record before him, Judge Meredith was correct in rejecting this injunction alternative. It is by no means unusual for antitrust judgments to go beyond the strict confines of the proved violation in order to assure effective relief (see *United States* v. *United States Gypsum Co.*, 340 U.S. at 88–89). This was especially true here, because of the close relationship between fabrication of curtain wall and of windows. Curtain wall is ordinarily composed of panels and window sections; Cupples and other firms entered the curtain wall business through the fabrication of windows (J.S. 5a–6a; R. XIV 3073, 3096). An injunction barring manufacture of curtain wall, but permitting manufacture of windows, would be very difficult to enforce. Cf. *United States* v. *du Pont & Co.*, 366 U.S. 316, *infra*.

that may be important to the sale and reconstitution of the Cupples business as an independent enterprise. An injunction against Alcoa's use of the plant to manufacture certain products which Cupples now produces obviously would not in any way further that purpose—although it would, of course, prevent Alcoa from gaining certain competitive advantages from the illegal acquisition. Moreover, such an injunction would involve the difficult problems of policing Alcoa's use of the Corona plant to insure that it was observing the limitations therein provided—a step that "would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture" (*United States* v. *du Pont & Co.*, 366 U.S. at 334). Here, as in *du Pont* (*ibid.*), "the public is entitled to the surer, cleaner remedy of divestiture." Finally, Alcoa cannot show how it would be injured by being required to sell the Corona plant at its market value.

3. The fact that the district court did not make any findings in connection with its decision to require Alcoa to divest the Corona plant does not vitiate that decision. While it is the better practice for a district court to make findings explaining the basis of the relief granted, we think that, in view of the extremely narrow issue presented to the district court, the lack of such findings here does not constitute reversible error. The sole issue that the district court had to decide was whether effective divestiture of Cupples could surely be achieved without also requiring dives-

titure of the Corona plant, and after conducting two hearings on this question the court concluded that the broader order of divestiture was required. We have set forth above the reasons why this conclusion was justified. The absence of findings of fact is not a fatal defect on appeal if the facts are undisputed (*Yanish* v. *Barber,* 232 F. 2d 939 (C.A. 9); *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union,* 170 F. 2d 695 (C.A. 2)), and their absence will be overlooked "if a full understanding of the issues could be reached without the aid of findings, even though such findings would have been helpful" (*Urbain* v. *Knapp Brothers Manufacturing Co.,* 217 F. 2d 810, 816 (C.A. 6), certiorari denied, 349 U.S. 930). While this Court frequently has examined a decree "in light of the record" to determine its adequacy (*United States* v. *Loew's Inc.,* 371 U.S. 38, 52), we know of no case in which the lack of findings as to the reasons for the relief granted has precluded the court from testing its propriety. See, *e.g., Md. & Va. Milk Producers Assn.* v. *United States,* 362 U.S. 458, 472–473, and particularly the opinion and decree in that case, No. 62, O.T., 1959, R. 84–87, 480–496, 504–507.

As we have shown, the record in the present case fully supports the district court's conclusion that, in order to cure the violation shown by the record, Alcoa was required to divest the Corona plant, and this conclusion is not undermined because of the district court's failure to make findings of fact which articulate the precise basis therefor.

CONCLUSION

For the foregoing reasons we submit that the decision below is correct and that the appeal presents no substantial question warranting plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROBERT L. WRIGHT,
Acting Assistant Attorney General.
LIONEL KESTENBAUM,
JERRY Z. PRUZANSKY,
EDNA LINGREEN,
Attorneys.

JUNE 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

Office-Supreme Court, U.S.
FILED
JUL 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 84

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

HERBERT A. BERGSON
HOWARD ADLER, JR.
SAMUEL H. SEYMOUR

BERGSON & BORKLAND
888 17th Street. N. W.
Washington, D. C. 20006

WILLIAM K. UNVERZAGT
1501 Alcoa Building
Pittsburgh 19, Pennsylvania

Attorneys for Appellants

July 16, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INTRODUCTION

The district court, without findings of fact, conclusions of law or opinion explaining the basis for its action, has ordered Alcoa to divest a $2.8 million plant at Corona, California, which it built more than two years after the Cupples acquisition and which was not found, or even alleged, to be held in violation of law. It was shown in the Jurisdictional Statement that the disputed order is not supported by a finding that the public interest requires divestiture of the Corona

plant (J.S. 12-16), and that, in fact, the record would not support any such finding (J.S. 16-21). This is the first time an order to divest after-acquired property has been before this Court.

The Motion to Affirm portrays this appeal as presenting "only a single narrow issue as to the scope of divestiture" (Motion 1), and argues that it is too insignificant to "warrant plenary consideration by this Court" (Motion 7). The implicit premise of this contention—that questions of relief are inherently less important than those of substantive law—is untenable, for it is well-settled that "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation."[1] Significantly, the Government, itself, has not hesitated to present questions regarding the scope of divestiture when it has failed to obtain the desired relief from the trial court.[2]

This appeal, we submit, presents substantial and unresolved questions regarding the use of divestiture with respect to after-acquired or after-created properties (J.S. 15-21). In this era of active Section 7 enforcement, these are issues of great importance to the courts and antitrust enforcement agencies as well as to the business community.[3] In addition, fundamental questions are raised as to the trial court's obligation to make findings of fact and conclusions of law in support

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[1] *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).

[2] See, e.g., *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961); *Maryland & Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960).

[3] Nor should the alleged narrowness of the issue obscure the fact that a very substantial Alcoa investment is involved. The cost of Corona, $2.8 million, is more than 40 per cent of the value of Alcoa stock used for the purchase of Cupples itself (GX 16; R. XVI 116).

of its decision on relief (J.S. 12-16). These issues merit plenary review, and nothing in the Government's arguments as to the alleged correctness of the disputed order leads to a different conclusion.

1. The Order Under Review Contemplates Separate Divestitures of Cupples and the Corona Plant

[Motion, Point 1, 7-10]

If, as shown in the Jurisdictional Statement (J.S. 11-12, 17), the disputed order permits separate divestitures of Corona and Cupples, this would eliminate the most plausible justification for divestiture of Corona, namely, that divestiture of Cupples as a going concern requires the inclusion of Corona. Recognizing this, the Government now attempts to show that the district court has entered a unitary divestiture order which "requires Alcoa initially to offer all three plants [including Corona] for sale and to permit a purchaser, if he wishes, to acquire as a going concern all the facilities that Cupples had while Alcoa owned it" (Motion 7). Under this theory, only if there is no prospective purchaser of Cupples who wants the Corona plant would Alcoa be free to dispose of it separately (Motion 9). Though closely akin to the unitary divestiture theory of the Government's Proposed Final Judgment, which the district court rejected, the Government's theory on appeal was not presented to, or articulated by, the district court. It is merely one of "appellate counsel's *post hoc* rationalizations" for the court's action.[4]

The Government's new theory is refuted by the history and language of the disputed order. On November 18, 1964, the Government submitted its Pro-

[4] *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962).

posed Final Judgment calling for a unitary divestiture of Cupples and Corona (R. XIV 2907 A-B). After hearing, at which appellants stressed that Corona was sustaining heavy losses and would be a liability to the divested Cupples (DXR 52; R. XIV 2995, 3027-32), the court rejected the Government's proposal and in separately numbered subparagraphs of Paragraph 2 ordered Alcoa to divest (1) Corona; and (2) Cupples (J.S. App. 24a-25a). At the same time, the court adopted Paragraphs 3 and 4 of the Government's Proposed Final Judgment, except for a significant conforming change in the final sentence of Paragraph 3, which changed "divestiture" to "divestitures," so that the sentence then read: "Divestitures shall then be accomplished by defendants in accordance with the plan approved by the Court" (R. XIV 2907 B; J.S. App. 25a).

If the district court had meant to adopt the Government's unitary divestiture theory, it would have been perfectly simple to insert language requiring Alcoa to offer the Corona plant as part of Cupples in the first instance. Not only was this not done, but, as shown, the court switched to the plural when referring to the *sales* Alcoa would be required to make pursuant to the Judgment. The inference is inescapable, therefore, that the unitary divestiture concept was rejected by the court.

In view of the above, it is indeed puzzling that the Government should now rely on the court's alleged use of the term "the divestiture" in the singular (Motion 8). Such usage occurs when the court is referring generally to the two-part divstiture ordered in Paragraph 2; as shown, when referring to the sales Alcoa would be required to make, the court adopted the plural. Since the Motion to Affirm does not mention,

much less explain, the court's important shift from singular to plural, it can only be assumed that the Solicitor General was unaware of it.

There is little need to consider in detail other arguments advanced by the Government. It is particularly absurd to suggest that divestiture of Corona as part of Cupples "may be essential" to the reconstitution of Cupples "as a going business" (Motion 8). Before the acquisition, Cupples, without Corona, was the nation's leading producer of aluminum curtain wall (J.S. App. 22a-23a). If anything, it will now be an even stronger "going business" since its original plants have been expanded and improved at a cost to Alcoa of over $1.5 million (J.S. App. 18a; GX 53, 54, R. XVIII 423, 425). The absurdity is compounded by the fact that the Corona plant, which was shown to be a badly losing proposition at the time of the divestiture proceedings (DXR 52, R. XIV 2995, 3027-32), was later permitted to be shut down because of "substantial and continuing losses," which the district court found were "adversely affecting the strength and viability of Cupples," and would "continue to do so unless the Corona plant is shut down" (R. XV 3190). The evident contemplation of the district judge thus is that the Corona operation will not be a "going business" and could not be divested as such.

The motion at pages 8-10 merely offers reasons why it might have been wise for the district court to order a unitary divestiture. This free wheeling discourse is not supported by a single citation to the record, and, in fact, is refuted by the evidence. While Cupples had considered building a West Coast plant, the undisputed evidence is that it would have done so on a much smaller scale, and that it would have withdrawn if the

West Coast curtain wall market failed to materialize (R. XIV 3015-17). Nor is there merit in the Government contention that "a prospective purchaser might well consider an existing [West Coast] facility . . . to be an important asset of the Cupples business" (Motion 9), for the court has found "no reasonable grounds for believing" that Corona's substantial losses will not continue (R. XV 3190). Finally, the Government's claim that Alcoa's retention of Corona, even if subject to an injunction against "making curtain wall and/or related products, . . . might chill the interest of prospective purchasers of Cupples" (Motion 10), is sheer speculation, without either evidence or reasoned argument to support it.

In sum, the Final Judgment contemplates two separate divestitures, and, therefore, the order to divest Corona cannot be rationalized as necessary to effect the divestiture of Cupples as a going concern.

2. The District Court Has Not Found, and the Evidence Does Not Establish, That Corona Is the "Fruit" of the Cupples Acquisition

[Motion, Points 1a and b, 10-15]

The Government states that "the district court's *findings* and the supporting evidence fully establish that the Corona plant was one of the 'fruits' of Alcoa's acquisition of Cupples." (Motion 10, emphasis added). This, again, is inaccurate and misleading. The only findings cited are those made by the district court when it entered a preliminary injunction concerning the use of Corona *pendente lite*. Those findings, however, as the court made clear, were "for the exclusive purpose of this Motion for Preliminary Injunction" (R. V 630), and did not, and could not, reflect con-

sideration of the evidence adduced on this issue at the hearing on relief. In fact, there were no findings on the "fruit" question or on any other aspect of the Corona divestiture, and this deficiency is itself reversible error (J.S. 12-16).[5]

Moreover, the "fruit" theory does not appear to be seriously advanced as a justification for divestiture, since the Government concedes, first, that if no prospective purchaser of Cupples wants Corona, it would consider a "modification of the Judgment to permit [Alcoa] to retain the Corona plant subject to suitable restrictions on its use . . ." (Motion 9-10); and, second, that such restrictions "would, of course, prevent Alcoa from gaining certain competitive advantages from the illegal acquisition" (Motion 16). Thus, even the Government acknowledges that injunctive relief could effectively strip Alcoa of the alleged "fruits" of the acquisition.[6]

In any event, Corona cannot fairly be considered the "fruit" of the Cupples acquisition (J.S. 17-19):

First. The Government's contentions that "the plant embodies Cupples' know-how, at least in layout

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[5] See *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 129-30 (1948), where this Court "set aside the divestiture provisions of the decree" and remanded the case for "findings necessary for an appropriate decree," including, *inter alia*, findings that would "reveal what the rewards of the conspiracy were . . . and what would be the preferable way of causing appellants to surrender them."

[6] Furthermore, there are as yet unresolved issues as to the applicability of the "fruits" doctrine in Section 7 cases. The only cases cited by the Government involved hardcore Sherman Act violations (Motion 13-14), and the "fruit" concept appears never to have been invoked in cases arising under Section 7 of the Clayton Act.

and design" and that the great value of such know-how induced Alcoa to acquire Cupples (Motion 14) are refuted by undisputed evidence that the Cupples know-how desired by Alcoa was in the design and marketing of aluminum curtain wall, not in the design of curtain wall plants; that Cupples had no special capability in designing such plants; and that Alcoa, with its many years' experience in the aluminum business, could readily have designed and built Corona without assistance from Cupples (J.S. 18; R. XIV 2929-75, 3019-24; DXR 2-47).

Second. There is nothing sinister about Alcoa's arrangements with respect to title to the Corona plant, nor do these arrangements bear on the "fruit" issue. Alcoa does not contend that its ownership of Corona would immunize it from divestiture if such divestiture were really required in order to redress the violation. Alcoa retained title because this accurately reflected the true facts, namely, that Corona was not an asset of Cupples at the time of acquisition, and hence was not part of the acquisition challenged by the Complaint. Retention of title was not intended to, and could not, assure "continued participation in the industry" (Motion 13).

Third. There is no indication that the court itself relied on the "fruit" theory in ordering divestiture of Corona. On the contrary, insofar as the court's mental processes are revealed at all, its real objective seems to have been to deny Alcoa use of the plant "as a means of getting into the business" (R. XIII 2881-82). This objective, as the Government now concedes, can be achieved by appropriate injunctive relief (Motion 10, 16; J.S. 19-21).

3. An Appropriate Injunction Would Effectively Redress the Violation

[Motion, Point 2, 15, 16]

It is argued that divestiture of Corona must be upheld because "no injunction, however broad in scope, will or can provide as effective relief as divestiture of the Cupples' portion of the business" (Motion 15). Admittedly, divestiture, the "most drastic" of antitrust remedies, is also the "most effective";[7] but it is not the necessary and inevitable remedy in every case. On the contrary, as this Court has held, it is the duty of the courts to give effect to the prohibitions of the statute "with as little injury as possible to the interests of private parties or the general public" and "to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).

The Government's specific objections to injunctive relief are completely untenable. It is true that such relief would not assure to the purchaser of Cupples an opportunity to acquire the Corona plant, but such opportunity is competitively meaningless for there is no continuing business at Corona, the court having permitted it to be shut down. Nor is there any factual basis for the claim that it would be difficult to police an injunction. Even if Alcoa were likely to disobey such a decree, which it emphatically is not, the products affected are easily identified and could not be sold with-

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[7] *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

out the instantaneous knowledge of Alcoa's competitors.[8]

Finally, the Government asserts that "Alcoa cannot show how it would be injured by being required to sell the Corona plant at its market value" (Motion 16). This argument hardly merits reply. It is extremely doubtful that fair market value could be realized in a forced sale, especially in view of Corona's enormous losses; but even if it could, in a free society neither Alcoa nor anyone else should be forced to sell its property against its will in the absence of a judicial determination that such sale is required by paramount public interest considerations. Cf. *Gilbertville Trucking Co.* v. *United States, supra,* 371 U.S. at 130-31.

4. The District Court's Failure to Comply with Rule 52(a) Is Reversible Error

[Motion, Point 3, 16-17]

The Government, though conceding that "it is the better practice for a district court to make findings explaining the basis of the relief granted," argues that the lack of such findings is not reversible error (Motion 16). This Court, however, has not tolerated failure to make such findings, but has repeatedly set aside remedial judgments where, as here, the court or agency failed to explain its reasons for selecting a harsh

[8] There is no meaningful comparison between a straightforward injunction against the manufacture and sale of specific, easily-identified products and the type of injunction that would have been required in the *duPont-General Motors* case on which the Government relies (Motion 16). The injunctive provisions rejected in *duPont* were intended to restrain subtle forms of intercorporate favoritism and, as this Court observed "could hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself." 366 U.S. at 334.

edy when some less severe alternative might have ceed. *Gilbertville Trucking, supra,* 371 U.S. at 129-Schine Chain Theatres, Inc. v. *United States, supra,* U.S. at 126-29; *Burlington Truck Lines, Inc.* v. ed States, 371 U.S. 156, 165-70 (1962); *Jacob el Co.* v. *FTC,* 327 U.S. 608 (1946); *Phelps Dodge* o. v. *NLRB,* 313 U.S. 177, 189-97 (1941). In view le explicit holdings of these cases, we are at a loss to erstand the Government's inability to find any case which the lack of findings as to the reasons for relief granted has precluded the court from testing propriety" (Motion 17).

CONCLUSION

or all of the foregoing reasons, we respectfully mit that the Motion to Affirm should be denied and able jurisdiction noted.

HERBERT A. BERGSON
HOWARD ADLER, JR.
SAMUEL H. SEYMOUR

BERGSON & BORKLAND
888 17th Street. N. W.
Washington, D. C. 20006

WILLIAM K. UNVERZAGT
1501 Alcoa Building
Pittsburgh 19, Pennsylvania

Attorneys for Appellants

16, 1965